

**VI. SBC'S INTELLECTUAL PROPERTY RESTRICTIONS VIOLATE SECTIONS 251(c)(3) AND 252(d)(1)**

As AT&T demonstrated in its comments to SBC's original application, it is SBC's position that it is free to procure or accept language in its licensing agreements with third party vendors that it claims permit or requires SBC to engage in the very discrimination that the 1996 Act was designed to prevent. In particular, while SBC admits that its licensing agreements permit SBC to use its network elements to provide the services that it offers, it claims that those provisions may not protect CLECs that lease those network elements to provide those same services from potentially crippling intellectual property liabilities. As AT&T further demonstrated, SBC's refusal either to modify its intellectual property licenses, where necessary, to enable CLECs to use those elements on the same terms as SBC or to agree to indemnify CLECs that use those elements from intellectual property liabilities is a blatant violation of SBC's duty to provide nondiscriminatory access to network elements at nondiscriminatory rates. AT&T Comments at 42-49.

To date, SBC's only response to this issue – a dispute that has been the subject of extensive proceedings before the TPUC, the federal district court in Texas, and the Commission – has been to make the promise (in a footnote) to abide by any “FCC order” in the MCI Declaratory Ruling Proceeding. SBC Br. 36. n.14. This gratuitous commitment is patently inadequate. As the Commission has explained, “a BOC's promise of future performance . . . has no probative value in demonstrating its present compliance with the requirements of section 271.” Ameritech Michigan Order ¶ 55.

Equally fundamentally, SBC's willingness to ignore this issue appears to proceed from the mistaken premise that any requirement to ensure that CLECs enjoy the same protections as SBC itself when they use SBC's network elements would arise only by operation of a

Commission rule, and that unless and until the Commission issues such a rule SBC's refusal either to modify or otherwise redress its restrictive licenses cannot be found to violate its checklist obligations. As the Fourth Circuit has held, however, an interconnection agreement that "does not provide [new entrants] equal license to use the intellectual property embedded in [the ILEC's network]" violates the statutory obligation to provide "nondiscriminatory" access to the incumbent's network elements. AT&T v. Bell Atlantic, 197 F.3d 663, 670-71 (4th Cir. 1999). Because that obligation arises directly from § 251(c)(3), and because the Commission lacks the authority either to "limit" the terms of the competitive checklist (§ 271(d)(4)) or to "forbear from applying the requirements of section[] 271" (§ 271(d)), the Commission cannot excuse SBC's failure to establish that its conduct today satisfies its nondiscriminatory access obligation.

Indeed, SBC's failure to redress this discrimination is particularly inexcusable given the ease with which SBC could eliminate the problem. In the short term, SBC could satisfy its nondiscriminatory access obligation by agreeing to indemnify CLECs using UNEs in a manner equivalent to SBC against any intellectual property liabilities that CLECs may incur from that use. That SBC could thus choose to satisfy its nondiscriminatory access obligation with a stroke of a pen provides further reason for rejecting its application on the current record. Witcher/Rhinehart Decl. ¶ 10.

## **VII. SBC'S USE RESTRICTIONS AND MERGER CONDITIONS VIOLATE SECTION 271**

SBC has also implemented a variety of restrictions on the use and price of unbundled elements that squarely conflict with section 271. In addition, SBC now purports to have exempted its data affiliate from the Act's unbundling obligations – as well as all the other duties of an incumbent LEC. Ostensibly, SBC relies on the Commission's SBC/Ameritech Merger

Order and Supplemental UNE Remand Order to justify these patently unlawful positions, but both those Orders conflict with the plain terms of the Act, and are not controlling in this proceeding. Indeed, the SBC/Ameritech Merger Order expressly states that the merger “conditions . . . are not intended to prejudice, or override, Commission action in other proceedings” and in particular are not “to be considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271 and 272.” SBC/Ameritech Merger Order ¶¶ 356-57. Because nothing could excuse SBC’s blatant price and use restrictions, its application must be denied on these grounds as well.

**A. SBC’s Use Restrictions On Unbundled Elements Plainly Violate The Act**

SBC violates section 271 because it refuses to allow competing LECs to use certain unbundled elements to provide exchange access services, in plain violation of section 251(c)(3) of the Act. That section unambiguously requires SBC to provide unbundled elements “to any requesting telecommunications carrier for the provision of a telecommunications service.” 47 U.S.C. § 251(c)(3) (emphasis added); see id. § 271(c)(2)(B)(ii). Exchange access services fall squarely within the Act’s definition of “telecommunications” service: “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). But even though the Act plainly requires SBC to provide unbundled loops and transport to competing LECs so that they can provide access services, SBC’s proposed amendments to the

T2A (upon which it bases its application) state that “[u]nbundled DS1 and DS3 subloops may not be employed in combination with transport facilities to replace special access facilities.”<sup>57</sup>

The Commission has already found that incumbent LECs may not prevent competing carriers from using unbundled elements to provide access services. In its Local Competition Order, the Commission found that “the plain language of the 1996 Act,” “compel[s]” the conclusion that competing carriers may “purchase unbundled elements for the purpose of offering exchange access services.” Local Competition Order ¶ 356. The Commission explained that “[s]ection 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements,” and therefore “incumbent LECs may not impose restrictions upon the uses to which requesting carriers put such network elements.” Id. ¶¶ 264, 27; see 47 C.F.R. §§ 51.309(a), 51.307(c), 51.309(b) (codifying the Commission’s conclusions). The Commission emphasized that the Act’s language “is not ambiguous” on this point and that “there is no statutory basis upon which we could reach a different conclusion. Local Competition Order ¶¶ 356, 359. Moreover, by requiring AT&T and other IXCs to pay wildly inflated access charges to use SBC’s facilities to originate and terminate interexchange calls while SBC can use those same facilities for those

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<sup>57</sup> See Auinbauh Supp. Aff., Att. C, Amendment UNE to the T2A, § 4.6.8. SBC’s use restrictions apply “except” where competing LECs use unbundled loops “consistently” with the FCC’s Supplemental UNE Remand Order. Id. As described below, that Order cannot render SBC’s use restriction lawful. Moreover, as AT&T showed in its initial comments in Docket 00-4, in the circumstances where SBC permits use of unbundled loops to provide access services, SBC has not provided a nondiscriminatory method of ordering those unbundled elements. AT&T Comments at 57-59.

same purposes at their economic cost, SBC could subject its interexchange competitors to a classic price squeeze.<sup>58</sup>

When AT&T raised this issue in connection with Bell Atlantic's section 271 Application for New York, the Commission refused to address the issue, stating that it had re-opened a pending rulemaking that addresses the lawfulness of such use restrictions generally, that it had decreed that such use restrictions would be permitted in the interim, and that it would defer the legal question – which it previously had found not ambiguous – to that rulemaking. See BA-NY Order ¶ 236 & n.755 (citing Supplemental UNE Remand Order).

The fact that the Commission purported to authorize this conduct on an interim basis in its Supplemental UNE Remand Order cannot excuse SBC's violation of the Act. As the Commission properly held in the Local Competition Order, section 251(c)(3) prohibits use restrictions. Local Competition Order ¶¶ 27, 264, 356, 359; 47 C.F.R. §§ 51.309(a), 51.307(c), 51.309(b). The Commission has no authority to waive this statutory prohibition, either generally (see 47 U.S.C. § 160(d) (Commission may not forbear from applying the requirements of section 251(c) until those requirements are “fully implemented”)) or for purposes of section 271 (see § 271(d)(4) (“The Commission may not, by rule or otherwise” limit the competitive checklist) (emphasis added)). See also Louisiana PSC v. FCC, 476 U.S. 355, 374 (1986) (“an agency literally has no power to act . . . unless and until Congress confers power on it”); MCI v. FCC, 765 F.2d 1186, 1194 (D.C. Cir. 1985) (“we are not at liberty to release the agency from the tie

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<sup>58</sup> It is no answer to contend, as Bell Atlantic did in the recently argued appeal of the BA-NY Order, that these anticompetitive effects are somehow addressed by section 272's imputation requirements. When SBC would “purchase” access services from its affiliate, it would merely be engaging in a left pocket-to-right pocket transaction and would simply be paying those inflated amounts to itself. For unaffiliated IXCs, by contrast, those inflated charges would represent real costs.

that binds it to the text Congress enacted”). Insofar as the Supplemental UNE Remand Order assumed otherwise, it is unlawful and cannot be applied in this proceeding.<sup>59</sup> The Commission therefore has “no alternative but to confront the issue” of SBC’s use restrictions in this proceeding, AT&T, 978 F.2d at 732, because the Commission cannot lawfully find that SBC has fully implemented its obligations under section 251(c)(3) where it precludes competing carriers from using unbundled loops to provide access services. See id. (reversing Commission’s decision to defer deciding issue raised in an adjudication until subsequent rulemaking).

**B. SBC’s Promotional Unbundled Loop Rates Violate The Act And Are Not Justified By The Merger Conditions**

Pursuant to the “carrier-to-carrier promotions” condition in the SBC/Ameritech Merger Order, SBC provides a number of unbundled loops at discounted rates, which a CLEC may use, only in conjunction with its own switch, to offer exclusively POTS services to residential customers only.<sup>60</sup> SBC’s promotion squarely violates sections 251(c)(3) and 252(d)(1) – and therefore section 271 – because it contravenes SBC’s duty to provide unbundled loops to any requesting carrier at “rates . . . that are . . . nondiscriminatory” and that are “based on the cost” of the loop.

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<sup>59</sup> Any attempt to apply an unlawful rule in this proceeding would itself be subject to reversal on judicial review. It is well-settled that when an agency purports to apply a pre-existing rule in an adjudication, the lawfulness of that rule is subject to judicial review on appeal of the decision in the adjudication. See, e.g., AT&T v. FCC, 978 F.2d 727, 734-36 (D.C. Cir. 1992); Independent Community Bankers v. Board of Governors, 195 F.3d 28, 34 (D.C. Cir. 1999); Graceba Total Communications v. FCC, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997).

<sup>60</sup> SBC/Ameritech Merger Order ¶ 391 & App. C, Condition XIV, ¶ 46e (discounted loops “shall be used to provide residential telephone exchange service and any associated exchange access service and shall not be used to provide any Advanced Services” and “shall not be purchased or used as part of a UNE Platform or in any other combination”).

Because the promotions are limited, CLECs will ultimately pay higher rates for identical loop facilities – a textbook violation of SBC’s stringent nondiscrimination duty. See AT&T v. Central Office Tel., Inc., 524 U.S. 214, 223 (1998) (“[r]egardless of the carrier’s motive, . . . the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services”).<sup>61</sup> Here, SBC’s promotion creates numerous forms of price discrimination, without even attempting any cost justification. Thus, in the residential market, the prices of unbundled loops for some customers are higher than the prices for otherwise identical customers. Indeed, even customers located next door to each other might be using loops with substantially different prices. That is discriminatory, and because only one of those loops could possibly correctly reflect TELRIC pricing principles, it also plainly violates the Act’s pricing standard.

Likewise, as a result of the promotion, the price of unbundled loops for business customers is higher than the price of loops for certain residential customers. This too is discriminatory. Indeed the Commission’s regulations plainly require that “[t]he rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier.” 47 C.F.R. § 51.503(c) (emphasis added). In the same way, under SBC’s promotion, the price of unbundled loops used in combination with an incumbent LEC switch is higher than the price of unbundled loops used in combination with a CLEC switch. This is another non-cost-based price difference, and its effect is to discriminate against carriers that are using combinations of network elements. It also conflicts with the Commission’s view that it must “establish rules that will ensure that all pro-competitive entry strategies may be

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<sup>61</sup> See also Local Competition Order ¶ 859 (noting that the 1996 Act contains even “more stringent” nondiscrimination provisions – like section 251 – than the prohibition against “unjust and unreasonable” discrimination in section 202(a)).

explored” and then let “the market” – and not “regulation” determine which succeeds. Local Competition Order ¶ 12.

Lastly, because of the discount, the prices for unbundled loops that are used to provide advanced services are higher than the prices for certain loops used to provide POTS service. This discriminatory use restriction not only turns section 706 on its head, but also blatantly violates section 251(c)(3), which allows carriers to use UNEs to provide any “telecommunications service,” not merely POTS services. See § 251(c)(3); 47 C.F.R. § 51.503(c) (“[t]he rates that an incumbent LEC assesses for elements shall not vary . . . on the type of services that the requesting carrier purchasing such elements uses them to provide”).<sup>62</sup>

**C. Contrary To The Merger Conditions, SBC’s Data Affiliate Must Be Deemed An Incumbent LEC.**

SBC’s merger conditions also violate section 271 because they purport to excuse ASI, SBC’s advanced services affiliate, from the obligations in section 251(c) that apply to all incumbent LECs.<sup>63</sup> ASI falls squarely within the definition of “incumbent LEC” in section 251(h) because it is a “successor or assign” to SBC, which shifted, virtually wholesale, its pre-existing advanced services line of business to ASI. Indeed, the very terms of the merger

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<sup>62</sup> In the SBC/Ameritech Merger Order ¶¶ 495-96, the Commission did not dispute the discriminatory effects of the promotion, but instead made the dubious claim that SBC “voluntarily offer[ed]” the promotions to CLECs. Because SBC’s “offer” was made via amendments to interconnection agreements, the Commission asserted that section 252(a)(1) permitted this outright discrimination because negotiated agreements need not comply with sections 251(b)-(c). Even assuming the Commission could describe these promotions as voluntary, the Act squarely provides that a negotiated agreement cannot be approved where it “discriminates against a telecommunications carrier not a party to an agreement.” § 252(e)(5). Congress thus expressly recognized the competitive harm from allowing deviations – like the promotions here – from the nondiscrimination principles that “lie[] at the heart of the . . . Communications Act.” AT&T, 524 U.S. at 223.

<sup>63</sup> See SBC/Ameritech Merger Order ¶ 458; see id. ¶¶ 445-76.

conditions confirm that ASI succeeds SBC: those conditions expressly permitted massive transfers of assets and employees from SBC to ASI – on a discriminatory basis – and continue to allow substantial integration. Accordingly, ASI is undoubtedly a “successor or assign” to SBC – and therefore an incumbent LEC – which requires it to implement all of the unbundling and resale duties in section 251(c). Because ASI has not even attempted to comply with those obligations – based on the flawed view that the merger conditions excuse such compliance – SBC’s application must be denied.

Section 251(h) broadly defines “incumbent local exchange carrier” to include not merely local carriers existing in 1996, but also any entity that becomes a “successor or assign” of such carriers. 47 U.S.C. § 251(h)(1).<sup>64</sup> Given the purposes of sections 251 and 252, no reasonable interpretation of “successor or assign” could possibly exclude a wholly-owned – and significantly integrated – subsidiary of an incumbent LEC that continues to provide pre-existing local exchange services using facilities, employees and other assets previously owned by and transferred from the incumbent. As the Commission recognized, SBC/Ameritech Merger Order ¶ 454, a company succeeds another where “there is substantial continuity between the enterprises,” especially where the “new company has ‘acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business

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<sup>64</sup> Congress also gave the Commission sweeping authority to treat “comparable” local exchange carriers as incumbents, 47 U.S.C. § 252(h)(2), which is further evidence that Congress intended the restrictions and obligations that apply to incumbents to be applied in a sufficiently flexible manner to accomplish the Act’s core purpose of opening local markets to competition by requiring incumbents to afford nondiscriminatory access to their networks.

operations.”” Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43-46 (1987) (quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973)).<sup>65</sup>

Under these principles, there is “substantial continuity” between ASI and SBC, which makes ASI SBC’s successor and, therefore, an incumbent LEC. Fall River Dyeing, 482 U.S. at 43. First, ASI has “continued, without interruption or substantial change” SBC’s previous advanced services operations. Id. Prior to the close of the merger, SBC provided advanced services to customers in Texas, and now those same operations are being carried on by ASI. See SBC, Supp. Aff. of Lincoln Brown, ¶ 10 (“Brown Supp. Aff.”) (noting that ASI became the “provider of record” for SBC’s “embedded” DSL customers). Indeed, other than a disclaimer footnote that DSL service is provided by ASI, SBC’s web site proclaims that SBC provides DSL service and urges consumers to buy from “Pacific Bell/Southwestern Bell/Nevada Bell/Ameritech/SNET” because the DSL service is “backed up by years of experience and reliability. . . . [W]e’re able to deliver to you high-speed DSL Internet access from a name you know and trust.”<sup>66</sup> Thus, ASI is continuing to promote DSL service without *any* (let alone “substantial”) change from SBC’s prior operations, and is in fact trumpeting to consumers SBC’s advantages as an incumbent – a quintessential case for finding successorship.

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<sup>65</sup> Under this test, the Supreme Court has examined a number of factors, including “whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs . . . ; whether the new entity . . . produces the same products, and basically has the same body of customers.” Fall River Dyeing, 482 U.S. at 43. These standards were developed under the labor laws, which naturally focus on employer-employee relations, but the Court’s examination of the continuity between the two companies is equally applicable to this context.

<sup>66</sup> See [www.pacbell.com/DSL/content/1,1888,2,00.html?site\\_code=SWBT](http://www.pacbell.com/DSL/content/1,1888,2,00.html?site_code=SWBT). Although the web site’s domain is Pacific Bell’s, customers of other SBC-owned incumbent LECs are transferred to this site when they request information on DSL from those incumbent LEC web pages. See [www.sbc.com](http://www.sbc.com).

Second, ASI has “acquired substantial assets” of SBC, including “Advanced Services equipment,” “software, customer accounts, initial capital contribution,” “real estate,” “trademarks” and “service marks,” and, perhaps most significantly, SBC’s employees. See SBC/Ameritech Merger Order App. C, ¶¶ 3 & n.5, 3c(3), 3d-g. All of these transfers demonstrate the “substantial continuity” that makes ASI a successor to SBC. For example, ASI acquired SBC’s customer accounts, and therefore “basically has the same body of customers.” Fall River Dyeing, 482 U.S. at 43. As for employees and equipment, the merger conditions provide for “an orderly and efficient transfer of personnel and systems” from SBC to ASI by allowing a “Grace Period” during which SBC may transfer “on an exclusive basis” any “Advanced Services equipment, including supporting facilities and personnel.” SBC/Ameritech Merger Order App. C, ¶¶ 3c(3), 3e. The explicit purpose of such equipment transfers – “to prevent [ASI] from having to duplicate investments that have already been made by the SBC/Ameritech incumbent” and to allow it to provide service “more quickly” (*id.* ¶ 464) – demonstrates the substantial benefits ASI derived from SBC’s incumbency.<sup>67</sup> And though SBC has not disclosed many details about transfers of employees, its affiant’s testimony that ASI will grow at the incredible pace of 400 employees in October, 1999 to about 3000 by April, 2000 (Brown Supp. Aff. ¶ 8) strongly suggests that most of ASI’s employees are simply being transferred from SBC. See Fall River Dyeing, 482 U.S. at 43-46; NLRB v. Burns, 406 U.S. 272, 280-81 (1972) (finding successorship obligations where new company hired a majority of

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<sup>67</sup> The exclusive nature of these SBC-ASI equipment transfers is yet another significant indicia of successorship under Fall River Dyeing, where the Court found successorship despite the fact that the company “purchased the assets . . . on the open market.” 482 U.S. at 44 & n.10. Here, by contrast, competing LECs had no opportunity to acquire SBC’s existing assets. Unlike ASI, they must obtain their own advanced services equipment through the open market, even if that retards their market entry.

predecessor's former employees).<sup>68</sup> For all these reasons, the merger conditions provide ASI with the classic markings of a successor: a wholesale transfer of assets that allows it to carry on its predecessor's business seamlessly and with all the advantages of the incumbent.

The Commission's approval of the presumption against ASI's successorship was largely based on its view that ASI was sufficiently separate from SBC and that, in particular, it would adhere to some of the requirements of a section 272 affiliate. SBC/Ameritech Merger Order ¶¶ 455-76. But that conclusion is flawed, for three reasons.

First, and as AT&T showed earlier, even strict separation does not reduce in any way the incentive to discriminate in favor of an affiliate. Thus, the anti-discrimination goals that must inform the successorship inquiry cannot be met merely by separating ASI and SBC. While separation may be necessary, it is not sufficient to preclude successorship unless accompanied by a break in continuity.<sup>69</sup>

Second, the Commission's "guide[]" for the ASI-SBC separation – section 272 – was not intended to serve as a method of avoiding incumbent LEC status under section 251(h)(1). Section 272 applies only after an incumbent LEC has demonstrated that it has fully implemented all of the unbundling obligations of section 251, yet SBC seeks to be excused from demonstrating nondiscriminatory DSL provisioning merely by showing that ASI is separate and fully operational.

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<sup>68</sup> Because ASI's employees may be "located within the same buildings" and even on "the same floors" as SBC's employees, SBC/Ameritech Merger Order App. C, ¶ 3g, many ASI employees likely remain in the same offices as when they were SBC employees. Cf. Fall River Dyeing, 482 U.S. at 44 ("[O]f particular significance" to successorship inquiry was "the fact that, from the perspective of the employees, their jobs did not change").

<sup>69</sup> Indeed, courts have routinely found successorship even where the two companies were in no way affiliated, and thus unquestionably separate. See Fall River Dyeing, 482 U.S. at 32, 44-45; Burns, 406 U.S. at 274.

Finally, as AT&T has previously shown, the merger conditions are much less stringent even than what is required by section 272 – and patently insufficient to prevent discrimination.<sup>70</sup> The Commission itself noted the merger condition’s numerous exceptions to section 272 and its separation requirements, including ASI’s exclusive rights to SBC’s customer care functions, exclusive use of SBC’s brand names, exclusive sharing of SBC’s real estate and office space, use of SBC’s operation, installation and maintenance (“OI&M”) services, temporary exclusive use of SBC’s network planning engineering, design and assignment services, SBC’s exclusive services for one year in receiving and isolating troubles for ASI’s customers, and exclusive temporary line sharing with SBC. SBC/Ameritech Merger Order ¶ 460. The Commission omitted many others as well, such as the merger conditions’ express waiver of section 272(b)(5)’s transaction disclosure requirement, their short sunset, and their weakened audit requirements. See AT&T BA-NY Ex Parte at 29-33; Pfau/Chambers Supp. Decl. ¶¶ 83-89.

Each of these exceptions permits significant opportunities for SBC to act on its incentives to favor its affiliate’s advanced services operations. To take just one example, the Commission had previously determined that the requirement in section 272 that a BOC “operate[] independently” of its affiliates required that they could not “perform operating, installation, and maintenance functions” for each other’s facilities.<sup>71</sup> That was because “allowing the same individuals to perform such core [OI&M] functions on the facilities of both entities would create substantial opportunities for improper cost allocation . . . [and] would inevitably afford the

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<sup>70</sup> See Comments of AT&T Corp. on Proposed Conditions, CC Docket 98-141 (July 19, 1999); Comments of AT&T Corp on Bell Atlantic’s Advanced Services Affiliate Proposal, CC Docket 99-295 (Dec. 17, 1999) (“AT&T BA-NY Ex Parte”) (Attached to Pfau/Chambers Supp. Decl.); see also Comments of AT&T Corp., CC Docket 98-147 (Sept. 25, 1998) (comments on similar advanced services affiliate proposal).

<sup>71</sup> Non-Accounting Safeguards Order ¶ 157.

affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitor's." Id. ¶ 163 (emphasis added). Nevertheless, the merger conditions permit SBC to perform OI&M for ASI on an exclusive basis for the duration of the conditions. See AT&T BA-NY Ex Parte at 26-29; Pfau/Chambers Supp. Decl. ¶ 87.

By their own terms the merger conditions demonstrate why ASI must be deemed a successor to SBC and thus an incumbent LEC. The conditions not only afford ASI with significant and exclusive access to assets that allow it to seamlessly continue SBC's business, but also ensure that ASI will maintain on an ongoing basis a substantially integrated relationship with SBC, giving SBC numerous avenues to discriminate in favor of ASI, squarely contrary to the Act's pro-competitive goals.

As discussed supra, the fact that these statutory violations were the subject of conditions in the SBC-Ameritech Merger Order does not permit the Commission to ignore those violations here. SBC had no right to agree to "voluntary conditions" that violate the Act; the Commission has no authority to approve such statutory violations in a section 271 proceeding (or a license transfer proceeding) or to grant an application in the face of such violations; and any decision to approve or ignore these violations in this proceeding would be subject to judicial review in which the lawfulness of SBC's conduct under the Act would be at issue. See supra Part VII.A. Because SBC is violating the Act and has thereby failed to implement the checklist, its application must be denied.

**CONCLUSION**

For the reasons stated above and in AT&T's Comments and Reply Comments, SBC's section 271 application should be denied.

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April 26, 2000

**REDACTED – NOT FOR PUBLIC INSPECTION**

**AT&T CONFIDENTIAL ATTACHMENT**

**FILED UNDER SEAL**

**PURSUANT TO PROTECTIVE ORDER**

**CC DOCKET 00-65**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of April, 2000, I caused true and correct copies of the foregoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: April 26, 2000  
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